

CHAPTER

1

DISPUTE RESOLUTION: ADVERSARIAL SYSTEM AND INQUISITORIAL SYSTEM*

Civil Law System

The civil law system (sometimes known as 'Continental European law') which has existed since time immemorial, is commonly exercised in many countries in Europe, Asia, Africa and South America. The most credible example of civil law recorded in history was the Code of Hammurabi which approximately dates back to 1795-1750 BC. It was further developed during the Roman Empire and evolved into a series of codes across Europe such as the Civil Code of Napoleon, the German Civil Code and the Italian Civil Code.¹ The obvious feature in the civil law system is that its 'core principles are codified into a referable system which serves as the primary source of law.' Legal rules are codified in the form of statutes enacted by a competent legislative body which forms the primary source of law. These statutes basically deal with all possible matters which could be brought before a court, the applicable procedures for proceedings and the appropriate punishment for offences.

* This chapter is contributed by Ashgar Ali Ali Mohamed and Muhamad Hassan Ahmad.

1 See also EJ Powell, SM Mitchell 'The International Court of Justice and the World's Three Legal Systems' *The Journal of Politics* Vol. 69(2) (2007) p. 398.

Generally, under this system a solution to a particular case is based on the provisions in a code or statute, for example, the French legal system is contained in the *Code Civil*, or *Code Napoléon*, (Civil Code or Napoleonic Code) which was drawn up in 1804. The said Code laid down the rights and obligations of citizens, the laws of property, contract and inheritance, among others. The other codes enforced in France are the *Code Pénal* or Penal Code, which defines criminal law and the *Code Fiscal* (Fiscal Code). Statutory instruments (*décrets, ordonnances*) are passed by the two houses of the French Parliament, the National Assembly and the Senate, and it becomes law when it is signed by the minister and published in the *Journal Officiel* or Official Journal.

Judges in the civil law system are more than just arbitrators. They lead the hearing and this includes establishing the facts of the case and applying the relevant provisions of the applicable statute to the case. It is the court's duty to determine the truth and the court is not bound by the parties' factual admissions or stipulations, for example, the French Code of Criminal Procedure confers upon the presiding judge discretionary authority to take, 'on his honor and conscience', all measures he or she deems useful to discover the truth.² When the formal document of accusation has been filed by the prosecutor, the presiding judge reviews the evidence gathered before the trial. In addition to witnesses suggested by both parties, he or she can have any other witnesses called, can appoint experts and have physical evidence produced. It is the presiding judge who interrogates the defendant and all witnesses. Members of the court may ask additional questions³ whereas the parties are limited to suggesting additional questions but may not themselves examine witnesses.⁴ Apart from the above, cases are generally decided using the provisions of the statute on a

2 Code of Criminal Procedure (France), art. 310.

3 *Ibid* art. 311.

4 *Ibid* art. 312. See 'Criminal Procedure: Comparative Aspects — Adjudication' at <http://law.jrank.org/pages/901/Criminal-Procedure-Comparative-Aspects-Adjudication.html#ixzz3AYC7aqHX>.

case-by-case basis, without reference to judicial decisions. Even though inferior courts are not bound by the decisions of the higher courts, the higher court's decision nevertheless still has a certain influence on the inferior courts.⁵

Common Law System

Compared to the civil law system, the origin and development of common law may be considered relatively new, as it emerged after the Norman Conquest in 1066 AD. The Norman invaders introduced fundamental components of the common law system in the absence of written law. This system was maintained by English kings in resistance to the influence of continental law, i.e., civil law.⁶ The common law system emphasised on judicial precedent or *stare decisis* which is derived from the decisions of the courts. It is sometimes called 'case law'. This doctrine dictates that in the hierarchical system of courts, it is necessary for each lower tier to accept loyally the decisions of the higher tiers.

Apart from judicial precedent, the institution of prosecution is the sole prerogative of the Attorney-General. The Attorney-General's discretion under art. 145(3) of the Federal Constitution in criminal matters is unfettered and cannot be subject to judicial review in the ordinary court of law. In *Long bin Samat & Ors v. Public Prosecutor*,⁷ Suffian LP stated:

Anyone who is dissatisfied with the Attorney-General's decision not to prosecute, or not to go on with a prosecution or his decision to prefer a charge for a less serious offence when there is evidence of a more serious offence which should be tried in a higher court, should seek his remedy elsewhere, but not in the courts.

⁵ See 'The French legal system' at http://www.justice.gouv.fr/art_pix/french_legal_system.pdf.

⁶ See EJ Powell, SM Mitchell 'The International Court of Justice and the World's Three Legal Systems' *The Journal of Politics* Vol. 69(2) (2007) p. 398.

⁷ [1974] 1 LNS 80, FC.

Further, it is the duty of the prosecution to make out a case against the accused by adducing evidence to establish the charge levelled against him. In *Balachandran v. Public Prosecutor*,⁸ the Federal Court stated *inter alia*, that in order to make a finding, the court must, at the close of the prosecution's case, undertake a positive evaluation of the credibility and reliability of all the evidences adduced to determine whether all the elements of the offence have been established. If the evidence is un rebutted, and the accused remains silent, he must be convicted. Therefore, the test to be applied at the end of the prosecution's case is whether there is sufficient evidence to convict the accused if he chooses to remain silent, which if answered in the affirmative means that a *prima facie* case has been made out.

The parties, and not the judge, have the primary responsibility of conducting the proceedings by defining the issues in dispute and advancing the evidence to substantiate their claims. Certain types of evidence are generally inadmissible for the reasons that their prejudicial effect outweighs their probative value or because they give rise to side issues that would complicate the trial, distract the trial of fact and unnecessarily cause delay, for example, evidence relating to similar facts, character, hearsay and opinion is generally excluded for these reasons.

Further, the judge is, and must remain, an impartial umpire:

He cannot do anything which gives the impression that he has descended into the arena of the conflict ... trial must be one that is fair, impartial and not leaning to either side. ... Counsel, and the judge have their respective roles to play. Basically, it is the role of the judge to hold the balance between the contending parties and to decide the case on the evidence brought by both sides and in accordance with the rules of the particular court and the procedure and practice chosen by the parties in accordance with those rules.⁹

8 [2005] 1 CLJ 85, FC.

9 Justice Philip Nnaemeka-Agu 'The Role of Lawyers in the Protection and Advancement of Human Rights' [1993] 1 CLJ iv.

The primary function of a judge in the common law system is to interpret the law and to give effect to the purpose or object of the laws enacted by the legislature.¹⁰ In *Teo Hoon Seong & Ors v. Suruhanjaya Pilihan Raya*, it was declared:

It is never the duty of the Court to order any laws to be made. An order of such nature amounts to a usurpation of the function of the legislature or any such bodies.¹¹

Further, a judge cannot overrule a statute or even amend, modify, or alter it. They can only make law through interpretation of statutory laws and customary rules.

The role of a judge in the common law system was aptly noted by Lord Denning MR in *Jones v. National Coal Board*:¹²

A judge's part ... is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevances and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the role of an advocate; and the change does not become him well.

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10 See *United Malacca Bhd v. Pentadbir Tanah Daerah Alor Gajah and Other Applications* [2002] 4 CLJ 177, FC; *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1994] 4 CLJ 285, FC.

11 [2012] MLJU 183 per Rohana Yusof J. See also *Muthukamaru @ Muthukumar a/l Veeriah v. Pemungut Duti Harta Pesaka* [1998] 1 LNS 267: 'It cannot impose its own will against the will of the legislature, no matter how much the party wants the court to do so' per Abdul Kadir Sulaiman J.

12 [1957] 2 All ER 155, CA.

Adversarial System v. Inquisitorial System

The two modes of trial commonly adopted in contemporary legal systems are the adversarial and inquisitorial systems. Malaysian courts adhere to the common law adversarial system while the inquisitorial system is common in civil law countries. Under the adversarial system, the parties through their advocates, control their respective cases in the best manner as it appears to them and the court does not direct or dictate to them on how to conduct their cases.¹³ In criminal cases, the police would conduct the investigation and submit the report to the Public Prosecutor who will then determine whether the suspect should be prosecuted. The trial is oral in nature, and the prosecution has to establish a *prima facie* case before the accused can be called to enter his defence.

The trial judge merely presides at the hearing and takes a passive role in the presentation of the evidence.¹⁴ The judge is expected only to listen and may ask questions for the purpose of seeking clarifications. He is not permitted to call witnesses except with the parties' consent. Further, the judge will ensure that the best evidence is adduced to prove a particular fact, to see that witnesses only give relevant facts and not their opinion unless it is an expert opinion. Where necessary, judges must be mindful of the need to have corroboration or caution when assessing whether the prosecution has proven their case as noted by Lord Denning in *Jones v. National Coal Board*.¹⁵

13 See *Syed Ibrahim Syed Mohd & Ors v. Esso Production Malaysia Incorporated* [2004] 1 CLJ 889, CA.

14 See *Payremalu Veerappan v. Dr Amarjeet Kaur & Ors* [2001] 4 CLJ 380, HC.

15 [1957] 2 QB 55.

Meanwhile, in the inquisitorial system, apart from the local police, the investigating judge is actively involved in the investigation and examination of all evidence in order to establish the facts of the case against the accused. The investigation by the police and the investigating judge is to collect evidence in order to determine whether a case against the accused has been established and ought to go for trial. The judge can question witnesses, interrogate suspects and order searches for further investigations. The court thus plays a dominant role in investigating the facts, forming an opinion whether the evidence was sufficient to justify charging the accused and to establish whether there is a *prima facie* case against the accused from the available records. When declaring the verdict, the judge must also release the reasoning for the verdict. Further, in this system, a plea of guilt is not common, for even if the accused has pleaded guilty, the judge may declare the accused not guilty if he believes that there is evidence to indicate that the accused is innocent.

The following table briefly outlines the important features of the adversarial and inquisitorial systems.

	ADVERSARIAL SYSTEM	INQUISITORIAL SYSTEM
Judicial precedent	Previous decision of the superior court binds the courts below.	Heavy reliance is placed on statutes/codes of law. Each case is decided independently of previous decisions.
Investigation	The responsibility for gathering evidence rests with the police who will then forward the investigation report to the Public Prosecutor. The latter will then decide whether to press charges. Further, the accused has a right to plead guilty and avoid trial.	Investigations are carried out by the prosecutor or may request the police with appropriate instruction on how to conduct the investigation. Even a judge may carry out or oversee the investigative phase. Regardless of the accused's wishes or plea of guilt, the trial continues until the end.

Examining phase	No examination phase. Evidence gathered during investigation is evaluated at the trial.	There is an examination phase. The examining judge reviews evidence and decides whether the case should proceed to trial.
The trial process	Prosecutor acts on behalf of the State while the defence lawyer acts on behalf of the accused. Trial is conducted before an impartial adjudicator, a judge. Parties determine the witnesses they call and the nature of the evidence they wish to tender and it is subject to examination-in-chief, cross-examination and re-examination. The trial is the exclusive forum for determining the truth i.e., to determine whether the accused is guilty as per the charge. The court's role is confined to overseeing the process by which evidence is given and then weighing up that evidence to determine whether a case has been established beyond reasonable doubt (criminal case) or on a balance of probabilities (civil case). Further, evidence upon a matter must be given on oath.	A record of evidence gathered at the examining phase is made available to the prosecution and defence well in advance of the trial. The conduct of the trial is largely in the hands of the court. At the trial, the case is presented to the trial judge and, in some cases, the jury, to allow the lawyers to present oral argument in public. The trial judge determines which witnesses to call and the order in which they are to be heard, and assumes the dominant role in questioning them. While there is no cross-examination and re-examination of witnesses, witnesses are still questioned and challenged. The offender's criminal history, for example, may be read to the court before the trial begins.

Role of the trial judge and counsel	<p>A judge is a referee at the hearing. It is the judge's function to ensure that the case is conducted in a manner that observes the rule of natural justice. The trial judge must confine himself to the evidence tendered at the trial and arrive at a specific verdict based only on the established facts. The judge will decide whether the accused is guilty beyond reasonable doubt, and thereafter determines the sentence. Meanwhile, lawyers are primarily responsible for introducing evidence and questioning witnesses.</p>	<p>Judges have an active position in the trial. They are required to direct the courtroom debate and to come to a final decision. The judge assumes the role of principal interrogator of witnesses and the defendant, and is under an obligation to evaluate all relevant evidence in reaching their decision. It is the judge who carries out most of the examination of witnesses. They lead the hearing and this includes establishing the facts of the case and applying the relevant provisions of the applicable statute to the case.</p>
Rules of evidence	<p>The rule around admissibility of evidence is strictly observed. Evidence which is prejudicial or of little probative value, is more likely to be inadmissible. For example, in Malaysia, the Evidence Act 1950, which applies to all judicial proceedings, determines the admissibility of the evidence in court. The admissibility of evidence is determined in terms of relevancy and proof; evidence produced in court is reliable; tendering of the best evidence; evidence is limited to the scope of material and relevant facts; and mode of production of evidence in court.</p>	<p>The rules around admissibility of evidence are significantly more lenient. Evidence is likely to be admitted regardless of its reliability or prejudicial effect. The trial judge will decide to admit evidence if it is relevant. Hearsay evidence is more readily allowable if it is reliable.</p>

Role of the victim	In criminal cases, a victim is not a party to proceedings. The Prosecutor acts on behalf of the state to prosecute the perpetrator and does not represent the victim.	The victim generally has a more recognised role in inquisitorial systems. They usually have the status of a party to proceedings.
Organisation of courts	There are courts of general jurisdiction which are able to adjudicate a wide range of cases.	Civil law systems tend to have specialist courts (and specialist appeal courts) to deal with constitutional law, criminal law, administrative law, commercial law, and civil or private law.

Adversarial Procedure Of Civil Cases With Reference To The Rules Of Court 2012

When parties are unable to resolve their disputes on their own or through the intervention of a third party, the matter would then proceed with litigation in the ordinary courts of law. Litigation, which is an adversarial proceeding, will involve filing of the dispute with the court for relief sought. As noted earlier, in the adversarial system, the parties through their advocate controls the course of the trial. The parties may decide on the evidence that shall be adduced. Subject to the existing laws relating to procedure and trial, the parties are given freedom to present their case and set forth their points of view. The ultimate reliance for the decision of the case will depend on the presentation of the evidence.

The presiding judge merely adjudicates on the pleadings and evidence produced by the parties. In order to ascertain the truth, the judge must thoroughly elucidate the facts and issue of the case in hand and thereafter, make a decision that attains a reasonable degree of certainty.

Apart from the above, the parties are subject to the stringent civil and criminal procedural rules of the court. The primary purpose of procedural rules is to promote the ends of justice. Adherence to the

rules of the court will ensure a speedy and efficient administration of justice. The discussion below is with reference to the application of the procedural rules in civil causes or matters.

Pleading

In a civil dispute, parties are required to file pleadings and other originating documents. Pleadings comprise of the statement of claim, statement of defence and the reply. The documents mentioned should contain concise statements of all material facts on which the parties rely on for the purposes of establishing a claim or defence. The material facts must be as brief as the nature of the case allows. The object or the purpose of pleadings is to prevent any surprise and to enable disputes to be litigated in an orderly fashion.¹⁶ Where an issue is not raised in the pleadings, it would be objected to when adduced at trial, unless an application is made to amend the pleadings, and it is within the discretion of the court to allow or otherwise, an amendment. The court will only allow an amendment to pleadings if the proposed amendment would cause no injustice to the other parties.

Service Of Documents

Further, the documents filed in court must be served on the other party either by personal or substitute service. Certain documents require personal service such as a writ of summons,¹⁷ originating summons, a notice of an originating motion and a petition;¹⁸ third party notice to person not a party to the action;¹⁹ and defence and counterclaim against a person who is not a party to the action;²⁰ among others. In such situations, the document must be served personally

16 See *Commodore Pty Ltd v. Perpetual Trustees Estate & Agency Co of New Zealand Ltd* [1984] 1 NZLR 324.

17 Rules of Court 2012, O. 10 r. 1.

18 *Ibid* O. 10 r. 5.

19 *Ibid* O. 16 r. 3(3)(a).

20 *Ibid* O. 15 r. 3.

on each defendant.²¹ Apart from personal service, the writ or other originating process could also be served by sending these documents by prepaid AR (acknowledgment returned) registered post, addressed to the defendant's last known address, known to the plaintiff. This is an alternative to personal service. An AR registered post is a more sophisticated version of the ordinary registered post.²²

When service of the document in the ordinary form appears to the court to be impracticable for any reason, for example, the defendant's whereabouts is unknown or cannot be traced or the defendant has refused to accept the delivery or evade service, among others, substituted service of it may be obtained. In the civil courts, an application for substituted service is governed by the Rules of Court 2012 ('ROC 2012') O. 62 r. 5, while the guidelines for applying for substituted service is contained in Practice Note such as Practice Note No. 1 of 1968.

Discovery And Interrogation

Part of the litigation proceedings includes 'discovery' and 'interrogation'. Discovery often includes both the request for the production of important documents, as well as interrogatories, which request pertinent information by written questions. Further, a case management meeting will be fixed by the court to give such directions to the parties as to the future conduct of the action in order to ensure just, expeditious and economical disposal of the action. During the case management, parties to the action have to appear in person or be represented by counsel and the judge will give such directions as necessary for the speedy and expeditious disposal of the dispute.

21 Personal service is effected by leaving a copy of this document with the defendant, and if the defendant so requests at the time when it is left, showing him, (a) in the case where the document is a writ or other originating process, the sealed copy; and (b) in any other case, an office copy: see Rules of Court 2012, O. 62 r 3. In relation to the writ and other originating process, in so far as practicable, the first attempt at service shall be made not later than one month from the date of issue of writ or the originating process.

22 See *Amanah Merchant Bank Bhd v. Lim Tow Choon* [1994] 2 CLJ 1, SC.

Case Management

The court may, at any time after the commencement of proceedings, direct the parties to the proceedings to appear before the court for case management. The following directions are usually given during a case management:

- (1) directing the parties to furnish particulars of their claim and/or the filing of pleadings;
- (2) requiring the parties to formulate and settle the principal issues requiring determination at the trial;²³
- (3) ordering the parties to deliver their respective list of documents that may be used at the trial of the action;
- (4) directing the parties to furnish to the court and to exchange between themselves, a bundle containing each of their respective documents;
- (5) directing the parties to file and exchange the bundle of documents;²⁴
- (6) directing the parties to exchange and file a statement of agreed facts;
- (7) limiting the number of witnesses that each party to the action may call at the trial;
- (9) ordering the administration of interrogatories;²⁵
- (10) fixing a date for the hearing of the action;
- (11) directing the parties to file the witness statements, for example, when there is difficulty in tracing the witnesses;²⁶

²³ See *Tecomax (M) Sdn Bhd v. Lee Choon Keong* [2005] 2 ILR 725.

²⁴ See *Carling Air Compressor Sdn Bhd v. Leong Chee Kuen* [2005] 2 ILR 128.

²⁵ See *Yano Electronics (M) Sdn Bhd v. Fazila Bahadin* [2006] 3 ILR 1570. In this case, the Industrial Court in allowing the company to administer interrogatories to the claimant, stated: 'any steps that are taken "to reduce the issues or the length of trial and the saving of time and cost" should always be encouraged. This stand or spirit must be allowed to supersede any technicalities or legal form that may be found to be restrictive or prohibitive in any statutory form or guise'.

²⁶ See *Southern Bank Berhad v. Johnny Phun Chye Jin* [2008] 1 ILR 323.

- (12) dealing with all the applications for amendments to the pleadings;²⁷ and
- (13) directing the parties to file in their written submission for the case to be tried *de novo* and in the meantime to continue in their quest to seek an amicable solution.²⁸

Hearing In Open Court

The hearing of a case is held in open court where the public and the press are admitted. Section 15 of the Courts of Judicature Act 1964 ('CJA') and s. 101(1) of the Subordinate Courts Act 1948 which provides that, '[t]he place in which any Court is held for the purpose of trying any cause or matter, civil or criminal or holding any inquiry, shall be deemed an open and public court to which the public generally may have access.' In certain exceptional circumstances however, proceedings may be held *in camera* for example, where the court is satisfied that it is expedient in the interests of justice, public safety, public security or propriety or other sufficient reason, to do so, including where it is necessary to protect the identities of victims or interested witnesses.²⁹ In *Public Prosecutor v. Karpal Singh*,³⁰ Augustine Paul J stated:

Transparency in a court proceeding is ensured by the fact that it is conducted in public and that any member of the public is entitled to watch the proceeding ... The concept of open justice has two aspects; firstly, with regard to proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and, secondly, in criminal cases at any rate, all evidence communicated to the court is communicated publicly (see *AG v. Leveiler Magazine Ltd* [1979] AC 440). This ensures transparency in court proceedings.

27 See *Dectra Sdn Bhd v. Cynthia Geraldine De Castro* [2005] 3 ILR 261. See Justice Abdul Malik Ishak 'Summons for Directions and Other Related Issues Together With Case Management: A Synopsis' [2004] 3 CLJ liii.

28 See *Dryads Cosmetic Sdn Bhd v. Lee Yee Fuan* [2005] 3 ILR 141.

29 See Courts of Judicature Act 1964, s. 15; Child Act 2001, s. 12. See also the cases of *PP lwn. KK* [2007] 6 CLJ 367, HC; *Pendakwaraya lwn. Shahareil Said* [2007] 4 CLJ 405, HC.

30 [2002] 1 LNS 226.

Evidence

As noted earlier, during the trial, the parties may decide on the evidence that shall be introduced to support their case or claim. Evidence suggests anything that manifests the truth. It is a means upon which the judge depends to seek the truth and dispense justice. Evidence is admitted to enable the court to come to a proper decision. Cases must be decided on the evidence and that the evidence must be relevant and admissible. Without evidence, a court will not be able to deliver a just decision.

The law that regulates the admissibility of evidence and the mode of its production in courts is the Evidence Act 1950 ('EA').³¹ The Act determines, *inter alia*, the admissibility of evidence in terms of relevancy and proof. It ensures that the evidence tendered in court is the best evidence and those that are reliable.³² The Act also provides that the quality and not the quantity of the evidence is of utmost consideration.³³ Further, the Act ensures that the evidence adduced in court is limited to the scope of material and relevant facts, and this will certainly save time and avoid raising issues which are too remote or irrelevant. Evidence relating to similar facts, character, hearsay and opinion are examples of evidence which are generally excluded for the mentioned reasons.³⁴

31 Came into force on 23 May 1950 in West Malaysia and on 1 November 1971 in East Malaysia.

32 The law of evidence determines the admissibility of the evidence in court. Evidence Act 1950, s. 136 provides that the court shall admit evidence if it thinks that the fact, if proved, would be relevant, and not otherwise. Admissibility therefore is subject to relevancy and proof.

33 Evidence Act 1950, s. 134 provides that no particular number of witnesses shall in any case be required for the proof of any fact. The above is aptly described by the following maxim 'evidence has to be weighed and not counted.'

34 See The Annotated Statutes of Malaysia: Evidence Act 1950 (Act 56) (Revised – 1971) (2002).

Examination Of Witness

The manner in which witnesses shall be produced and examined is governed by s. 137 of the EA which provides:

- (1) The examination of a witness by the party who calls him shall be called his examination-in-chief.
- (2) The examination of a witness by the adverse party shall be called his cross-examination.
- (3) Where a witness has been cross-examined and is then examined by the party who called him, such examination shall be called his re-examination.

The purpose of an examination-in-chief is to elicit from the witness all the material facts in order to prove the case of the party that calls him. Cross-examination, on the other hand, is intended to elicit answers from the witness in favour of the opposing party and to reduce the evidential value of his testimony. Meanwhile, re-examination is intended to restore the credibility of the witness after cross-examination by attempting to reconcile any discrepancies revealed thereby, if any.

The order of examinations and direction of re-examination is governed by s. 138 of the EA:

- (1) Witnesses shall be first examined-in-chief, then, if the adverse party so desires, cross-examined, then if the party calling them so desires, re-examined.
- (2) The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.
- (3) The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter.
- (4) The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.

Generally, the court will not permit the recall of a witness who had been examined unless special circumstances can be established. In *Chua Kiang Boon v. Prestasi Flour Mill (M) Sdn Bhd*, it was maintained that:

In civil cases a judge will seldom permit recall of the plaintiff after his case is closed to prove a material fact, except under special circumstances. Furthermore, a party should not be allowed to fill up any lacuna in the evidence using the avenue of recall of witness. Under ordinary circumstances it is not necessary or permissible to allow such recall unless there are sufficient reasons to justify such application.³⁵

Judgment

Upon hearing all concerned parties and the evidence presented, the court will make a decision. In deciding on the matter before it, the court has to consider and weigh all questions raised. The decision to be arrived at, has to be based on the evidence collected. Any violation of the above principles in the exercise of a judicial or quasi-judicial power may result in the action being declared illegal and thus, void. For example, if there is any reliance on documents that were not shown to the person charged, or denial of the right to cross-examine witnesses, or denial of inspection of documents produced, among others, would constitute a violation of the principles of natural justice.

Written Judgment

The presiding judicial officer must deliver written grounds of judgment. He is not required to give the judgment immediately but may reserve it to a later date so as to enable him to study the case properly. The written judgment 'should contain a narration of facts of the case, the issues to be adjudicated upon, a discussion on evidence, such as contradictions, inconsistencies, corroboration, warnings, accomplice's evidence etc., the findings of facts, a statement of law to be applied to the facts so found and finally the conclusion.'³⁶ The duty to give grounds for

³⁵ [2007] 2 ILR 452 per Yamuna Menon.

³⁶ Tan Sri Dato, Hj Mohd Salleh Abas 'Judgments/Grounds of Judgments of Subordinate Courts' [1984] 2 CLJ 142.

judgment applies to all the civil courts including the appellate courts, irrespective whether right to appeal was available or appeal is subject to leave.³⁷ In relation to the superior civil courts, *the Judges' Code of Ethics* which was drawn up in 1994 and amended in 2000, provides, *inter alia*, that judges must deliver written grounds of judgment. In *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan and Another Appeal*,³⁸ Gopal Sri Ram JCA observed:

The judicial policy whereby a judge is duty bound to give reasons for his decisions was expressly declared by Azmi LP in the *Rukun Keadilan*, or *Principles of Justice*. See [1971] 2 MLJ xliii. It is only very recently that the policy has received institutional sanction. That sanction is to be found in Art 125(3A) of the Federal Constitution. *The Judges' Code of Ethics* to which cl 3A of the Article refers was published in the *Gazette* on 2 December 1994. Among other matters, it proscribes a judge from “inordinately and without reasonable explanation delay in the disposal of cases, the delivery or decisions and the writing of grounds of judgment”. And, Art. 125(3) (as does the code) provides, *inter alia*, that a judge may be removed from office “on the ground of any breach of any provision of the code of ethics ...”.

So, it comes to this. In England, a judge who hands down a decision without providing reasons may be reversed and a retrial of the cause ordered. An identical situation Malaysia may result in the removal of the errant judge from office.³⁹

The rationale of recording reasons in support of a decision of a dispute is to ensure that the decision was not a result of the whims or fancies of a judge. In *Tan Kim Leng & Anor v. Choong Boon Eng & Anor*,⁴⁰ Raja Azlan Shah FJ (as his Royal Highness then was), delivering the judgment of the Federal Court, observed:

37 See *Pembinaan Majujaya & 2 Ors v. Lau Tiong Ik Construction Sdn Bhd* [2008] 1 LNS 29, HC.

38 [1997] 1 CLJ 665, CA.

39 *Ibid* at 723.

40 [1974] 2 MLJ 151.

A party to a dispute is ordinarily entitled to know the grounds on which the learned judge has decided against him, and more so, when the judgment is subject to appeal. An appellate court will then have adequate material on which it may determine whether the facts are properly ascertained, the law has been correctly applied and the resultant decision is just.

Again, in *Flannery v. Halifax Estate Agencies Ltd (trading as Colleys Professional Services)*,⁴¹ Henry LJ stated:

The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in *Ex p Dave*) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled; the resulting decision is much more likely to be soundly based on the evidence than if it is not.

In *Pembinaan Majujaya and Others v. Lau Tiong Ik Construction Sdn Bhd*,⁴² Hamid Sultan bin Abu Backer J spoke on the need to provide grounds of judgment in the following terms:

... courts are often inundated with much backlog of cases and more often than not, adjudicators are moved from one place to another with short notice and/or reach retirement age without making sure that the grounds of judgment are delivered before retirement and/or transfer. Unless this is done by introduction of the Act, rules and/or regulation by those who are responsible for the Administration of Justice, this problem of not having grounds of judgment which is often seen as a social ill and flagrant breach of duty of a judge cannot be arrested. Further, it must be appreciated that the manpower involved in the administration of justice are yearly increased by arithmetical progression only. However, the number of cases, which are filed, are increasing in geometrical proportion. In consequence, the writing

⁴¹ [2000] 1 WLR 377 at 381, CA.

⁴² [2008] 1 LNS 29, HC.

of judgments for adjudicators is almost an endless job with no light thrown on its path. Thus, grounds for judgment must not be seen anymore as *sine qua non* for hearing of appeal when the adjudicators' position is compromised by various shortcomings.

Costs

In relation to costs, the civil court has the discretionary power to award costs, for example, item 15 of the Schedule in the CJA, confers on the High Court the power to award costs, while all matters relating to costs are contained in O. 59 of the ROC 2012. Meanwhile, the scale of costs is contained in the Appendix to the said Order. Generally, the successful party is entitled to be paid his costs unless there are special grounds to order otherwise. In *Re Elgindata Ltd (No 2)*,⁴³ the following observations in relation to costs were made:

- (i) costs are at the discretion of the court;
- (ii) they should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made;
- (iii) the general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or partly of his costs; and
- (iv) where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but order him to pay the whole or part of the unsuccessful party's costs. Where the court decides to make no order as to costs, each party will have to bear his own costs.

43 [1993] 1 All ER 232 at 237.

Decision Is Subsequently Open To Appeal

Parties who are unhappy or dissatisfied with the decision of the trial court may file an appeal against the said decision in the superior courts. Decisions from the Magistrates' Court and Sessions Court goes on appeal to the High Court. An appeal to the Court of Appeal would be against the decision of the High Court exercising original jurisdiction or appellate or revisionary jurisdiction in respect of any matter decided by the Sessions Court.⁴⁴ If the appeal is against the decision of the Magistrates' court, an appeal to the Court of Appeal may lie from the decision of the High Court exercising appellate or revisionary jurisdiction but shall be restricted on question of law which has arisen in the course of appeal or revision.⁴⁵ The Federal Court hears appeals from the Court of Appeal, which has been heard and decided by the High Court exercising original jurisdiction.⁴⁶ An appeal can lie to the Federal Court only with the leave from the Federal Court.⁴⁷ The procedure governing appeals to the above mentioned superior courts is contained in the rules of the respective courts.⁴⁸

Stay Of Execution

While awaiting the hearing of the appeal, an application would be made to stay execution. A stay of execution means that the execution of the order or judgment of the court below is suspended and pending the determination of the hearing of the appeal. The rationale of a stay pending appeal is to ensure that a successful appeal should not be rendered futile. It is an accepted rule of practice that in criminal

⁴⁴ Courts of Judicature Act 1964, s. 50.

⁴⁵ *Ibid* s. 50(2).

⁴⁶ *Ibid* s. 87(1).

⁴⁷ *Ibid* s. 96(a).

⁴⁸ See Rules of Court 2012; Rules of the Court of Appeal 1994; Rules of the Federal Court 1995.

appeals, an application for a stay of execution under s. 311 of the Criminal Procedure Code⁴⁹ would be granted in respect of a sentence of whipping and imprisonment but a fine will have to be paid mainly because a fine could be refunded.⁵⁰

In relation to civil matters, O. 56 r. 1(4) of the ROC 2012 provides:

Except so far as the Court may otherwise direct, an appeal under this rule shall not operate as a stay of the proceedings in which the appeal is brought.

A stay of execution of the civil judgment or order of the High Court to the Court of Appeal is regulated by s. 73 of the CJA which provides:

An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.

Further, r. 13 of the Rules of the Court of Appeal 1994 provides:

An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the High Court or the Court⁵¹ so orders and no intermediate act or proceeding shall be invalidated except so far as the Court may direct.

49 This section provides:

Except in the case of a sentence of whipping (the execution of which shall be stayed pending appeal), no appeal shall operate as a stay of execution, but the Court below or a Judge may stay execution on any judgment, order, conviction or sentence pending appeal, on such terms as to security for the payment of any money or the performance or non-performance of any act or the suffering of any punishment ordered by or in such judgment, order, conviction or sentence as to the Court below or to such Judge may see reasonable.

50 See *Mohd Noor Yunus & Ors v. Public Prosecutor* [2000] 5 CLJ 168, HC.

51 Court of Appeal.

Stay of execution against the judgment of the Court of Appeal to the Federal Court which is the apex court in Malaysia, is provided in s. 102 of the CJA. It provides *inter alia*, that an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the Court of Appeal or the Federal Court so orders. When granting leave to appeal under s. 97(2) of the CJA, the Federal Court may direct a stay of execution of the order appealed against or direct the terms of the order to be carried into effect.

Generally, the civil courts have adopted the special circumstances approach where the unsuccessful party applying for stay of execution must display special or exceptional circumstances which warrant the imposition of a stay. It is incumbent upon the applicant to show from the affidavit the special circumstances to enable the grant of a stay of execution. The court will exercise the discretion, in granting or otherwise of a stay of execution, on the established judicial principles. What constitutes special circumstances is not defined in the statute. Nevertheless, it must be a situation that is exceptional or not ordinary and this would depend on the facts of each case. Thus, the category of special circumstances is not exhaustive or closed and may change from time to time. In *Leong Poh Shee v. Ng Kat Chong*,⁵² Raja Azlan Shah J stated:

Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common.

Again, in *The Government of Malaysia v. Datuk Haji Mohamad Mastan and Another Case*,⁵³ the court noted:

The definition only serves to emphasise the fact that there are myriad circumstances that could constitute special circumstances with each case depending on its own facts. I am of the opinion that the list of

⁵² [1965] 1 LNS 90, HC.

⁵³ [1993] 4 CLJ 98 at 102, HC.

factors constituting special circumstances is infinite and could grow with time. Any attempt to limit the list or close a category would be to impose a fetter on the exercise of the discretion of the court whether to grant or stay an execution; making the discretion less of a discretion. This is surely not what discretion is all about. As long as one does not stray beyond the perimeter set by the judicial principles, the discretion can be exercised.

Enforcement Of Judgment

Lastly, the procedure and the machinery for obtaining satisfaction of a judgment or compelling compliance is governed by the ROC 2012. The objective of the procedure for enforcement of a judgment is to use the assets of the judgement debtor to satisfy the debt he has failed to pay, for example, in enforcement of a judgment requiring the payment of money, the methods commonly used are as follows:

- (1) Examination of judgment debtor;⁵⁴
- (2) Writs of seizure and sale;⁵⁵
- (3) Garnishee proceeding;⁵⁶

54 Rules of Court 2012, O. 48 enables the judgment creditor to have the judgment debtor orally examined before the court to uncover the debtor's income and means of satisfying the judgment debts. The examination process of the judgment debtor is contained in the Debtors Act 1957 and its procedure is provided in Rules of Court 2012, O. 48 and O. 74.

55 A writ of seizure and sale involves the seizure of a judgment debtor's property for the purpose of sale in order to satisfy a judgment debt. The writ directs the bailiff of the court to seize goods and chattels belonging to the debtor and to sell the seized properties by public auction. The proceeds of the sale is paid to the judgment creditor for the realisation of the judgment debt. The procedure governing the issuance and execution of seizure and sale is contained in Rules of Court 2012, O. 47.

56 The purpose of the garnishee order is to enable a judgment creditor, who has knowledge and/or information as to the indebtedness of the garnishee to the judgment debtor, to obtain an order directing the garnishee to pay the judgment creditor the amount of any debt due, or accruing due, to the judgment debtor from the garnishee, or so much thereof as sufficient to satisfy that judgment. The procedure governing the application of a garnishee order is contained in Rules of Court 2012, O. 49.

- (4) Charging order;⁵⁷
- (5) Obtaining a stop notice over share;⁵⁸
- (6) Appointment of receivers;⁵⁹ and/or
- (7) Committal for contempt of court.⁶⁰

In short, litigating disputes in the courts would be subjected to the stringent procedural rules and is thus costly, time-consuming with unpredictable outcomes and above all, creating irreversible damage to the relationships between the parties. Hence, solving disputes outside the framework of conventional litigation should be preferred.

57 This order enables the court to impose a charge on certain securities to which the judgment debtor is beneficially entitled to, for securing payment of the amount due under the judgment. The procedure governing the application of a charging order is contained in Rules of Court 2012, O. 50.

58 Rules of Court, O. 50 rr. 10-13 provide for the issue of a stop notice in respect of securities mentioned in the charging order above. The effect of the stop notice is to prevent any payment on the securities without notice to the claimant affording him an opportunity of asserting his claim.

59 Appointment of a receiver is a form of equitable execution. It is a means of enforcing the rights of the judgment creditor against the property of the judgment debtor where such property cannot be executed upon by the normal legal process, e.g. where the judgment creditor could not take garnishee proceedings because the judgment debtor was out of jurisdiction. In this situation, the court may allow the appointment of a receiver by way of equitable execution. The procedure governing the application for the appointment of receiver is contained in Rules of Court 2012, O. 51.

60 The judicial basis for the law of contempt was explained by Anuar J in *MBF Holdings Bhd & Anor v. Hong Hai Kong & Ors* [1993] 3 CLJ 373 at 378, HC:

It is paramount in the public interest that every court should have the power and authority or jurisdiction to punish persons who scandalise it or disobey orders made by it. If such power is absent, then the public will lose all confidence in the authority of the judicial arm of the state leading to anarchy and disorder.

The procedure governing the application for committal is contained in Rules of Court, O. 52.

Lastly, if the defendant, a company goes into liquidation the payment of the proceeds of the company's assets shall be distributed in the manner provided in sub-s. 527(1) of the Companies Act 2016.⁶¹ The debts mentioned in sub-s. 527(1) shall rank in the order therein specified, and the debt of the same class shall rank equally between themselves and shall be paid in full, unless the property of the company is insufficient to meet them, in which case they shall abate in equal proportions between themselves.⁶²

61 The preferential payment of the company's assets as provided in s. 527(1) of the Companies Act 2016 shall be distributed in the following manner, namely:

- (a) the costs and expenses of the winding-up including the taxed costs of a petitioner payable under s. 468, the remuneration of the liquidator and the costs of any audit carried out pursuant to s. 514;
- (b) all wages or salary (whether or not earned wholly or in part by way of commission) including any amount payable by way of allowance or reimbursement under any contract of employment or award or agreement regulating conditions of employment, of any employee not exceeding fifteen thousand ringgit or such other amount as may be prescribed whether for time or piecework in respect of services rendered by him to the company within a period of four months before the commencement of the winding up;
- (c) all amounts due in respect of workers compensation under any written law relating to workmen's compensation accrued before the commencement of the winding up;
- (d) all remuneration payable to any employee in respect of vacation leave, or in the case of his death to any other person in his right, accrued in respect of any period before the commencement of winding up;
- (e) all amounts due in respect of contributions payable during the twelve months next before the commencement of the winding up by the company as the employer of any person under any written law relating to employees social security contribution and superannuation or provident funds or under any scheme of superannuation or retirement benefit which is an approved scheme under the federal law relating to income tax; and
- (f) the amount of all federal tax assessed under any written law before the date of the commencement of the winding-up or assessed of any time before the time fixed for the proving of debt has expired.

62 Companies Act 2016, s. 527(2).